Supreme Court, U.S.
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In The

Supreme Court of the United States

SUPERIOR HIGHWALL MINERS, INC., and TEREX CORPORATION,

Petitioners,

v.

DANNY L. FRYE,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Appeals Of West Virginia

PETITION FOR A WRIT OF CERTIORARI

ANCIL G. RAMEY
Counsel of Record
STEPTOE & JOHNSON PLLC
P.O. Box 1588
Charleston, WV 25326
(304) 353-8112
ancil.ramey@steptoe-johnson.com

A. NEAL BARKUS
A. NEAL BARKUS PLLC
224 West King Street
Martinsburg, WV 25401
(304) 260-9414
neal@wvworkplace.com

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QUESTION PRESENTED

In this case, a West Virginia jury imposed, and the trial court upheld, $328,280 in compensatory damages and $1.5 million in punitive damages in an employment discrimination case. The trial court held that (1) evidence of a prima facie case is sufficient; (2) rejection of a nondiscriminatory reason is sufficient; and (3) the evidence presented was sufficient to support the award of punitive damages. The Supreme Court of Appeals of West Virginia, in one of only two states that deny an appeal of right to defendants who are ordered to pay punitive damages, declined to grant any appellate review. The question presented is:

Whether the Due Process Clause of the Fourteenth Amendment requires States to afford litigants at least one appeal as of right in cases involving the imposition of punitive damages.

LIST OF PARTIES AND RULE 29.6 STATEMENT

Terex Corporation is a publicly traded company. It has no parent corporation and no entity owns 10% or more of its stock.

Superior Highwall Miners, Inc., is a wholly-owned subsidiary of Terex Corporation.

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OPINION BELOW

The order of the Supreme Court of Appeals of West Virginia denying Petitioners' petition for appeal is unreported. App. 1a.

JURISDICTION

The Supreme Court of Appeals entered an order refusing to hear Petitioners' petition for appeal on January 13, 2010. App.1a. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

This petition is properly directed to the Supreme Court of Appeals even though it denied discretionary review, because the constitutional defect challenged here is inherent in that court's denial of discretionary review. See, e.g., *Burns v. Ohio*, 360 U.S. 252 (1959) (reviewing challenge to Ohio Supreme Court's refusal to hear a case because the petitioner did not pay the filing fee). Petitioners have filed a separate, concurrent petition on the merits that is addressed to the trial court.

CONSTITUTIONAL AND STATUTORY PROVISION INVOLVED

The Fourteenth Amendment provides that "[n]o State shall . . . deprive any person of life, liberty, or

property, without due process of law. . . ." U.S. Const. amend. XIV, § 1.

Rule 7 of the West Virginia Rules of Appellate Procedure, in relevant part, states:

> (a) Rejection. If the petition for appeal is rejected by the Supreme Court on the ground that the judgment or order is plainly right, no other petition for appeal from that judgment or order shall be permitted. If the petition for appeal is rejected on any other ground, or if no ground be cited in the rejection, the petitioner may renew the petition as many times as he desires during the period prescribed by law for presentation of petitions. . . .
>
> (c) Allowance. If the petition for appeal is granted:
>
> > (1) The Clerk of the Supreme Court shall docket the same and immediately send a copy of the order granting the appeal to the petitioner's counsel, or, if there is no counsel of record, to the petitioner, and to the clerk of the circuit court, who shall retain the same in his records.
> >
> > (2) The Clerk of the Supreme Court shall forthwith return the record, unless the entire record had been transmitted, to the clerk of the circuit court for preparation of the record of the case for appeal in accordance with Rules 8 and 9.

> (3) The Clerk of the Supreme Court shall then send a copy of the order to all parties appearing of record, other than the petitioner, that they may be heard. . . .

STATEMENT OF THE CASE

This case presents the issue of whether the summary denial of discretionary appellate review comports with this Court's decisions concerning appellate review of punitive damages awards.

As explained in greater detail in a separate petition on the merits filed today and directed to the trial court, Petitioners have been subjected to a $1.5 million punitive damages award in an age discrimination case with a ratio to compensatory damages of nearly 5:1 despite the absence of any reprehensible conduct.

Petitioners urged the trial court to reduce or eliminate the punitive award, but it disregarded this Court's requirements for the post-trial review of punitive damages awards; entered an order prepared by plaintiff's counsel; and affirmed the award both as to its imposition and amount.

West Virginia does not have a system of intermediate appellate courts. The sole appellate court in the state is the Supreme Court of Appeals of West Virginia. Petitioners therefore filed a timely petition for appeal on July 7, 2009. This petition reiterated

Petitioners' arguments to the trial court that the punitive damages awarded violated Petitioners' federal due process rights. The Supreme Court of Appeals, however, declined review and, on January 13, 2010, entered a one-page order stating that "[u]pon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal." App.1a. No explanation was provided for the court's decision.

REASONS FOR GRANTING THE WRIT

Unlike all other States but one, West Virginia does not afford litigants an appeal as of right. The State has no intermediate appellate court and review by the Supreme Court of Appeals is entirely discretionary. The losing party in a West Virginia trial court must file a *petition* for appeal. W. Va. R. App. P. 3, 5, 7; see W. Va. Const. art. 8, § 4. If the petition is denied, the trial court's decision is summarily affirmed and, unless the party successfully petitions for a writ of certiorari in this Court (which, even in that event, would lack the power to correct any errors of state law), the Petitioner is provided with no explanation of what was supposed to be a *de novo* appellate review of the punitive damages award.

The Supreme Court of Appeals exercises absolute discretion in deciding whether to grant or deny a petition for appeal. W. Va. R. App. P. 7; see *Billotti v.*

Dodrill, 183 W. Va. 48, 52, 394 S.E.2d 32, 37 (1990). A petition for appeal thus resembles a petition for a writ of certiorari in this Court, except that a certiorari petition normally follows appellate review as of right in a federal or state appellate court. Unlike a grant of certiorari in this Court, moreover, a grant of leave to appeal to the Supreme Court of Appeals ordinarily requires the vote of a majority of the court's five justices. See Robert L. Stern, APPELLATE PRACTICE IN THE UNITED STATES 14 (2d ed. 1989). Only if a majority of the justices vote to allow an appeal will the case be docketed, the record assembled, the appeal fully briefed on the merits, oral argument heard, and an opinion published. W. Va. R. App. P. 7-12.

The Supreme Court of Appeals is the only appellate court in the state, and it denied discretionary review in this case. In doing so, the court denied Petitioners the searching appellate review that is essential to the constitutional imposition of punitive damages. Even if that court did engage in some sort of review of the merits, such an abbreviated process would not satisfy the "exacting" and *de novo* appellate review required by this Court's precedents.

Thus, this Court should grant this petition and remand the case to the Supreme Court of Appeals for *de novo* review of the constitutionality of the trial court's post-trial analysis of the punitive damages award, including at least some minimal articulation of why the appellate court concludes, if it does after such review, that punitive damages award comported

with the Due Process Clause of the Fourteenth Amendment.

THIS COURT SHOULD GRANT REVIEW TO CLARIFY THAT DUE PROCESS REQUIRES MEANINGFUL APPELLATE REVIEW OF PUNITIVE DAMAGES AWARDS.

1. This Court's Recent Precedents And Practical Experience Establish That Meaningful Appellate Review Is Essential To Constrain Punitive Damages Awards

Several times over the past decade this Court has recognized that arbitrary and unpredictable outlier awards of punitive damages threaten the basic fairness of our legal system, and the fundamental distinction between civil litigation and criminal punishment. In addition to enforcing substantive limits on the maximum size of punitive awards justifiable in particular cases, see, e.g., *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), this Court has also recognized the importance of traditional *procedural* protections that help to constrain the danger of excessive awards. The most important of those procedural constraints is post-verdict judicial review, by both the trial and appellate courts.

In *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991), the Court observed that, under "the traditional common-law approach," which the Court

"more than once has approved," the amount of punitive damages "is initially determined by a jury" and the jury's determination "is then reviewed by trial and appellate courts to ensure that it is reasonable." *Id.* at 15. In rejecting a due-process challenge to the punitive award in that case, the Court emphasized that, "[b]y its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion" and that "[t]his appellate review makes certain that the punitive damages are reasonable in their amount and rational in light of their purpose." *Id.* at 20-21.

Two Terms later, in upholding a punitive award against a due-process challenge in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), the plurality relied on the fact that the award was assessed by an impartial jury; that the award was reviewed and upheld by a trial judge who had heard the evidence; and that it "was affirmed by a unanimous decision of the State Supreme Court of Appeals." *Id.* at 457 (opinion of Stevens, J.). A judgment that is "a product of that process," the plurality said, "is entitled to a strong presumption of validity." *Ibid.*

The next Term, in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), the Court held that, as a matter of procedural due process, States must afford judicial review of awards of punitive damages challenged as excessive. In so holding, the Court observed that the decisions in *Haslip* and *TXO* had "strongly emphasized the importance of the procedural component of the Due Process Clause" and had specifically

emphasized the importance of appellate review. *Id.* at 420. *Haslip*, the Court explained, "stressed the availability of both 'meaningful and adequate review by the trial court' and subsequent appellate review," and *TXO* "found that the fact that the 'award was reviewed and upheld by the trial judge' and unanimously affirmed on appeal gave rise 'to a strong presumption of validity.'" *Id.* at 420-21 (quoting *Haslip*, 499 U.S. at 20, and *TXO*, 509 U.S. at 457). *Honda* has in fact been interpreted to stand for the proposition that "appellate review of punitive damage awards [is] required." Stephen C. Yeazell, *Punitive Damages, Descriptive Statistics, and the Economy of Civil Litigation*, 79 NOTRE DAME L. REV. 2025, 2027 (2004); accord Leonard E. Gross, *Time and Tide Wait for No Man: Should Lost Personal Time Be Compensable?*, 33 RUTGERS L.J. 683, 705 (2002).

In *Honda*, this Court required judicial review of punitive damages awards but did not decide what *standard* of review is constitutionally required. If *Honda* did not already recognize a due process right to appellate review of punitive awards, however, later decisions did.

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Court held that "courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards" and that vacatur and remand were required there because "the Court of Appeals applied an 'abuse of discretion' standard." *Id.* at 431, 436. The Court

mandated *de novo* review because such review enables appellate courts "to maintain control of, and to clarify, the legal principles" governing the constitutionality of punitive awards and "tends to unify precedent and stabilize the law." *Id.* at 436 (internal quotation marks omitted). The Court found support for the requirement in *Haslip*, which "emphasized the importance of appellate review to ensuring that a jury's award of punitive damages comports with due process." *Id.* at 436 n.9 (citing *Haslip*, 499 U.S. at 20-21).

Unlike this case, *Cooper Industries* involved review of a punitive award by a *federal* appellate court. But subsequent decisions of this Court confirm that the holding of the case is based on the Due Process Clause and therefore that, as Professor Chemerinsky has put it, "state appellate courts, too, must exercise *de novo* review over whether punitive damages are excessive." Erwin Chemerinsky, *The Constitution and Punishment*, 56 STAN. L. REV. 1049, 1069-70 (2004).

Thus, in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), a case arising in state court, the Court explained that, in policing the "constitutional limitations" on punitive awards, it had "instructed courts reviewing punitive damages to consider [certain] guideposts" and had "mandated appellate courts to conduct *de novo* review of a trial court's application of them to the jury's award," because "[e]xacting appellate review ensures that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's

caprice.'" *Id.* at 416, 418 (citing and quoting *Cooper Indus.*, 543 U.S. at 424, 436).

More recently, in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), another case arising in a state system, the Court explained that "the Constitution imposes certain limits[ ] in respect * * * to procedures for awarding punitive damages," and then listed, as one example of those constitutional limits, the rule that, under *Cooper Industries*, "review must be *de novo*." *Id.* at 353.

In the wake of *Cooper* and *State Farm*, the state courts have generally acknowledged that procedural due process requires *de novo* appellate review of punitive verdicts. See, e.g., *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 70 n.2 (Cal. 2005) ("The requirement of independent review applies to state as well as federal appellate courts when assessing excessiveness under the federal due process clause."); *Stroud v. Lints*, 790 N.E.2d 440, 442 (Ind. 2003) ("It is clear that a state is required, as a matter of constitutional law, to provide appellate review of the amount of a punitive damages award. . . . *State Farm* reaffirmed that an appellate court is required to review *de novo* a trial court's ruling on a due process challenge to a punitive award."); *Time Warner Entm't Co. v. Six Flags Over Georgia*, 563 S.E.2d 178, 180-81 (Ga. Ct. App. 2002) ("*Leatherman* requires state and federal appellate courts to review *de novo* claims that punitive damages awards are grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment[.]").

West Virginia apparently agrees that any appellate review afforded must be *de novo*, see Syl. pt. 16, *Peters v. Rivers Edge Mining, Inc.*, 224 W. Va. 160, 680 S.E.2d 791 (2009) ("When reviewing an award of punitive damages . . . this Court will review *de novo* the jury's award of punitive damages and the circuit court's ruling approving, rejecting, or reducing such award.") (citations omitted), but believes that it is acceptable to simply refuse a petition for appeal without explanation.

If the Due Process Clause of the Fourteenth Amendment requires that appellate review of punitive damages awards be *de novo*, as this Court's cases establish, Petitioners submit that the Due Process Clause must require there be at least some explanation, at the appellate level, of the reasons for affirming such awards. It cannot be that, although a State is constitutionally prohibited from engaging in deferential review of a punitive award, it is not constitutionally prohibited from summarily affirming a punitive award without explanation. If deferential review is unconstitutional, as it is, then it would seem that this type of review is unconstitutional *a fortiori*. A State cannot avoid its obligation to provide more than deferential review by providing less.

2. Appellate Review Is Required Under Conventional Procedural Due Process Analysis

Even if this Court's decisions did not establish a due process right to appellate review, including review of punitive damages, the existence of such a right would follow from the application of the procedural due process methodology employed in *Honda*. Under that approach, the Court looks both to "[m]odern practice" and to "common-law practice." *Honda*, 512 U.S. at 426, 435; see also *TXO*, 509 U.S. at 457.

Under the modern practice, the nearly uniform rule is that litigants are entitled to at least one appeal as of right. West Virginia is one of only two States that does not afford such a right. In the remaining 48 States and the District of Columbia, as well as the federal system, a defendant has the right to appellate review, either by an intermediate appellate court or by a supreme court with mandatory jurisdiction. See App. 3a-12a. Indeed, as far as appellate review of substantial punitive awards is concerned, West Virginia stands alone; the other State in which there is no appeal as of right – Virginia – protects against runaway awards by imposing a $350,000 cap. Va. Code § 8.01-38.1.

In addition, the Supreme Court of Virginia, unlike its West Virginia counterpart, considers its review of a petition for appeal to be a decision *on the merits*. *Sheets v. Castle*, 559 S.E.2d 616, 619 (Va. 2002). West Virginia therefore now stands completely alone in

leaving litigants exposed to potentially arbitrary awards, with no guaranteed right of appellate review on the merits whatsoever beyond consideration of a petition for appeal and entry of an order summarily rejected it.

The availability of an appeal as of right in all but two jurisdictions shows that the right of appeal "is a fundamental element of procedural fairness as generally understood in this country," Am. Bar Ass'n, Comm'n on Standards of Judicial Admin., STANDARDS RELATING TO APPELLATE COURTS § 3.10, at 18 (1994 ed.), and that a litigant's entitlement to "at least one review of an adverse final decision" is "firmly rooted," James D. Hopkins, *The Role of an Intermediate Appellate Court*, 41 BROOKLYN L. REV. 459, 463 (1975). Accordingly, just as there was a due-process violation in *Honda* because, "[i]n the federal courts and in every State[ ] except Oregon, judges review the size of damages awards," *Honda*, 512 U.S. at 426, there is a due-process violation here because, in the federal courts and in every State except West Virginia and one other, appellate courts review the size of damages awards upon the defendant's request.

This Court has frequently surveyed the current practices of the states to determine whether a challenged practice is consistent with prevailing norms of procedural due process.[1]

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[1] This Court has also used national consensus to inform whether State actions or standards violate other constitutional

(Continued on following page)

In *Shaffer v. Heitner*, 433 U.S. 186, 212 (1977), for example, this Court held that Delaware's practice of automatically asserting jurisdiction over shareholders by sequestering stock located in the State violated the Due Process Clause. Delaware, unlike the other 49 states, treated the place of incorporation as the situs of corporate stock even when both the owner of the stock and the custodian were located elsewhere. *Id.* at 218 (Stevens, J., concurring). As a result, Delaware courts asserted *quasi in rem* jurisdiction over any stock in a Delaware corporation irrespective of the owner's contacts with the state or the property's involvement in the litigation. *Id.* at 212. This Court barred Delaware's practice, recognizing that due process may be "offended by the perpetuation of ancient forms that are no longer justified . . . when the 'perpetuation of ancient forms' is engaged in by only a very small minority of the States." *Burnham v. Superior Court of California*, 495 U.S. 604, 621-22 (1990) (quoting *Shaffer*, 433 U.S. at 212).

This Court also invoked national consensus to hold that Oregon's system of highly deferential

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protections, including the Eighth Amendment, *see Kennedy v. Louisiana*, 128 S. Ct. 2641, 2649-52 (June 25, 2008) (barring execution of child rapists based upon, *inter alia*, "objective indicia of society's standards, as expressed in legislative enactments and state practice"), and substantive due process, *see Lawrence v. Texas*, 123 S. Ct. 2472, 2481 (2003) (recognizing a substantive due process right to engage in private homosexual conduct based upon a growing consensus among the States against enforcement of sodomy laws).

review of punitive awards violated procedural due process, noting that meaningful post-verdict review was provided "[i]n the federal courts and in every State, except Oregon." *Honda*, 512 U.S. at 426. This Court emphasized that "[t]he common-law practice, *the procedures applied by every other State*, the strong presumption favoring judicial review that we have applied in other areas of the law, and elementary considerations of justice all support the conclusion that such a decision should not be committed to the unreviewable discretion of a jury." *Id.* at 435 (emphasis added). Similar considerations support a holding that due process requires an appeal – at least in cases involving punitive damages.

A right of appeal in civil cases involving punitive damages is consistent with traditional practice. In the eighteenth century and earlier the word "appeal" frequently connoted a plenary reconsideration of both law *and facts* drawn from civil and ecclesiastical tradition, and was not necessarily available in actions at law. See, e.g., Mary Sarah Bilder, *The Origin of the Appeal in America*, 48 HASTINGS L.J. 913, 924-34 (1997).

The origins of what we now call an "appeal" lie instead with the common law writ of error, which permitted review only of legal errors disclosed by the record. *Id.* at 926-27; see also *Gasperini v. Center for Humanities*, 518 U.S. 415, 452 (1996) ("At common law, review of judgments was had only on writ of

error, limited to questions of law."); Roscoe Pound, APPELLATE PROCEDURE IN CIVIL CASES 132-33 (1941) ("[T]he proceeding in time came more and more to be recognized as in the nature of an appeal."); Benjamin Jonson Shipman, HAND-BOOK OF COMMON-LAW PLEADING 197 (1895) (The writ of error "proceeding corresponds to the appeal in code practice.").

In *Honda*, this Court cited and discussed numerous common law decisions, both in England and in the United States, reversing or reducing punitive awards under the writ of error or similar procedures that we would recognize as appellate. 512 U.S. at 421-25.

Under the common-law practice, too, courts acting in an appellate capacity reviewed damages awards. All of the eighteenth and early nineteenth century English cases cited in *Honda* for the proposition that "[j]udicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded" were decisions of common-law courts that served as courts of review. *Honda*, 512 U.S. at 421; see *id.* at 421-423. And there are numerous other cases from that period – and earlier – in which English courts exercising an appellate function reviewed damages awards. See, e.g., *Wilford v. Berkeley*, 97 Eng. Rep. 472, 472 (K.B. 1758) ("[t]he Court were, all three, clear and unanimous, that * * * there was no doubt of the power of the Court to exercise a proper discretion in setting aside verdicts for excessiveness

of damages"); see also *Wood v. Gunston*, 82 Eng. Rep. 867 (K.B. 1655); *Bolton v. Thomson*, 84 Eng. Rep. 724 (K.B. 1674); *Clerk v. Udall*, 91 Eng. Rep. 552 (K.B. 1702); *Chambers v. Robinson*, 93 Eng. Rep. 787 (K.B. 1726).

State appellate courts in this country likewise reviewed damages awards – and overturned them when excessive – from the time of the Founding through the ratification of the Fourteenth Amendment and beyond. Most of the nineteenth-century cases cited in *Honda* for the proposition that "American courts reviewed * * * the amount of [damages] awards" were decisions of appellate courts. *Honda*, 512 U.S. at 425; see *ibid.* And, there are many other such cases. See, e.g., *Harton v. Reavis*, 4 N.C. 256, 257 (1815) (recognizing the "duty of the court" to set aside a damages award when the jury "acted under the influence, either of undue motives, or some gross error or misconception"); see also *Roberts v. Swift*, 1 Yeates 209, 212 (Pa. 1793); *Franz v. Hilterbrand*, 45 Mo. 121, 124 (1869); *Pac. R.R. v. Hause*, 1 Wyo. 27, 34 (1871); *Rogers v. Henry*, 32 Wis. 327, 334 (1873); *McKinley v. Chicago & N.W. R.R.*, 44 Iowa 314, 322 (1876), *aff'd*, 99 U.S. 147 (1878).

Moreover, the right of appellate review was by no means limited at common law to excessiveness questions, and review was not discretionary. "Both appeals from proceedings in equity and admiralty, and

writs of error to secure review of judgments at common law, were available to appellants and petitioners in error as a matter of right." James E. Pfander, *Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers*, 101 COLUM. L. REV. 1515, 1570 (2001); see also, e.g., David Rossman, *"Were There No Appeal": The History of Review in American Criminal Courts*, 81 J. CRIM. L. & CRIMINOLOGY 518, 541 (1990) ("In England, writs of error were available as a matter of right in civil cases.") (citing 3 Blackstone Commentaries, at 406-11), Pound at 47, 116 (In civil cases, "the writ of error was, at common law, a writ of right.").

At that time, in both England and the United States, "writs of error to secure review of judgments at common law[ ] were available to * * * petitioners in error as a matter of right." *Ibid.*; accord Roscoe Pound, APPELLATE PROCEDURE IN CIVIL CASES 88, 116 (1941). Thus, West Virginia's system of appellate review violates due process because it departs from the tradition under which "[c]ommon-law courts in the United States," like "their English predecessors," provided a right of appellate review of money judgments. *Honda*, 512 U.S. at 424.

The framework for evaluation of procedural due process claims established by *Mathews v. Eldridge*, 424 U.S. 319 (1976), also supports the conclusion that due process requires at least one appeal as of right.

Under *Mathews*, the requirements of procedural due process in a particular setting generally turn on a balancing of three factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. The interests favoring at least one appeal as of right in cases involving substantial damages (or, at least, *punitive* damages) decisively outweigh any countervailing costs or inconvenience to the state, as demonstrated by the nearly uniform practice nationwide.

First, it is beyond dispute that large damage awards threaten a cognizable property interest. *Id.* at 335.

Second, because one-judge trial courts commit errors in a significant number of cases and West Virginia leaves correction of those errors to a purely discretionary system of appellate review, the risk of an erroneous deprivation of the property interest is high. *Ibid.*

Third, although the cost of providing appellate review of right is not inconsequential, West Virginia need not create an intermediate appellate court to do so; it need only ensure that its Supreme Court of Appeals reviews substantial judgments. In any event, "[f]inancial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard." *Id.* at 348. Indeed, because the issue here concerns disputes between private parties, the third element requires "principal attention to the interest of the [opposing] party," *Connecticut v. Doehr*, 501 U.S. 1, 11 (1991), and appellate review poses no threat to any legitimate interest of plaintiffs who have won a substantial money judgment. To the extent such a judgment is predicated on legal error, the system has no interest in leaving it uncorrected. As for awards of punitive damages, it is well accepted that they are in the nature of a windfall; plaintiff's have no "right" to receive any award of punitive damages, much less one that might be determined to be unconstitutional after appellate review.

Finally, the current ubiquity of punitive damages awards also makes appellate review far more important than it has ever been before. Traditionally, punitive awards received little attention because they were rarely assessed and typically small in amount. *Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting) (citing Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 2 (1982)). These

awards were reserved for only the most reprehensible acts or for pain, humiliation, or other injuries for which compensatory damages were not then available. *Id.* (citing K. Redden, PUNITIVE DAMAGES § 2.3(A) (1980); Note, *Exemplary Damages in the Law of Torts*, 70 HARV. L. REV. 517, 519-520 (1957)). Owing in part to the advent of mass tort litigation and state statutes authorizing punitive damages for, *inter alia*, bad faith contract breach, recent years have witnessed a dramatic rise in punitive awards. As Justice O'Connor explained in *Haslip*, this "explosion in the frequency and size of punitive damages awards has exposed the constitutional defects that inhere in the common-law system." 499 U.S. at 61-62 (O'Connor, J., dissenting); see also *Philip Morris*, 549 U.S. at 355 (noting that modern punitive damages "may be many times the size of such awards in the 18th and 19th centuries"); *BMW*, 517 U.S. at 594-95 (Breyer, J., concurring) (explaining that adjusted for inflation even "ancient extraordinary awards are small compared to the $2 million here at issue.")

3. This Court's Statements That There Is No Right To Appeal In Criminal Cases Should Not Prevent It From Recognizing The Need For Appellate Review Of Civil Cases Involving Substantial Damages

On a number of occasions, this Court has stated that there is no constitutional right to an appeal in a criminal case. See *Smith v. Robbins*, 528 U.S. 259,

270 n.5 (2000); *Jones v. Barnes*, 463 U.S. 745, 751 (1983); *Ross v. Moffitt*, 417 U.S. 600, 606 (1974). Those statements, however, are dicta. Moreover, no decision of this Court has held that a defendant may be denied any appeal in a criminal case. Regardless, dicta should not control the resolution of the issue presented here.

First, as noted above there is historical warrant for a distinction between civil and criminal cases. At common law, the writ of error was generally available in civil cases as of right. "In criminal cases, however, writs of error under English common law were available as a matter of right only in misdemeanors, provided the defendant made a showing to the attorney-general of sufficient probable cause." Rossman, *supra*, at 541. "In capital cases, such a writ was granted only upon the express consent of the attorney-general, which was a matter of grace." *Id.*

Second, the common law and the constitution establish and protect other procedures that ensure that criminal punishment is basically predictable and never the product of a decisionmaker's whim or caprice. The *Ex Post Facto* Clause, due process "fair warning" principles, and the requirement that the maximum punishment must be identified in advance by statute all ensure that criminal defendants have reasonable notice of the punishments that may be imposed for particular conduct. The presumption of innocence, right to remain silent, and requirement of proof beyond a reasonable doubt all tilt the adjudicative process strongly in defendants' favor. And of

course the writ of *habeas corpus*, also protected by the constitution except when suspended in cases of rebellion and invasion, guarantees that criminal defendants have a way to challenge their confinement after conviction even if direct appeal is not afforded or is not pursued.

Civil awards, even those involving punitive damages, are not constrained by any of those safeguards. They may be imposed on nothing but a preponderance standard, for conduct that the defendant may not have known in advance was wrongful and in any amount an enraged and capricious jury, perhaps falling sway to arguments, such as those made in this case, that large punitive damages should be awarded because one of the Petitioners is incorporated in a jurisdiction other than West Virginia, sees fit. Indeed, punitive damages awards may dramatically exceed the statutory civil or criminal punishments applicable to similar conduct. See *BMW*, 517 U.S. at 584 (deeming $2 million sanction excessive, as it was one thousand times greater than the maximum civil penalty); *New York Times v. Sullivan*, 376 U.S. 254, 277 (1964) ("Fear of damage awards under a rule such as that invoked by the Alabama courts here may be markedly more inhibiting than the fear of prosecution under a criminal statute.").

Consequently, this Court's recent cases establishing procedural safeguards for the review of punitive awards – including "exacting" *de novo* appellate review – emphasize that "[g]reat care must be taken to avoid use of the civil process to assess criminal

penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof." *State Farm*, 538 U.S. at 428; see also *Cooper*, 532 U.S. at 432 (describing punitive damages awards as "quasi-criminal" and requiring *de novo* appellate review to ensure that their imposition comports with due process); *Honda*, 512 U.S. at 434-35 (deeming limited safeguards against excessive punitive damages awards to be wholly insufficient).

As this Court explained in depth in *Haslip* and *Cooper*, appellate review of punitive awards for excessiveness is one of the safeguards that American law has traditionally imposed to protect against the arbitrary and excessive imposition of punishment through the civil process. *Cooper*, 532 U.S. at 433-36 (requiring appellate review to "maintain control of, and to clarify, the legal principles," including "gross excessiveness"); *Haslip*, 499 U.S. at 17-22 (recognizing traditional common law process for reviewing and constraining punitive awards).

The criminal process has different safeguards. Even if appellate review is not essential to due process of law after the far more stringent requirements for a criminal trial have been complied with, it is essential to protect against abuses when *punishment* is meted out through the far less rigorous process of civil litigation.

Third, although this Court has stated several times that there is no right to appeal in the criminal

context it has never relied upon this statement to deny a criminal defendant the right to at least one appeal. The issue was not reached by this Court because in all of these cases the state provided at least a single appeal as of right. Instead, the decisions involved only the constitutionality of *conditions surrounding* the appeal, not the more fundamental question of whether due process required access to appeal at all. See *Halbert v. Michigan*, 545 U.S. 605 (2005) (requiring appointed counsel for indigent defendants seeking first-tier appellate review in Michigan); *Jones*, 463 U.S. 745 (refusing to require appellate counsel to raise all non-frivolous issues requested by its client); *Ross*, 417 U.S. 600 (refusing to require counsel for second, discretionary appeal); *Griffin v. Illinois*, 351 U.S. 12 (1956) (barring state from conditioning first-tier appeal upon ability to pay for transcripts); *McKane v. Durston*, 153 U.S. 684 (1894) (permitting state to deny bail pending first appeal).

This Court's recent decisions suggest that appeal by right may in fact be necessary to the provision of due process in criminal cases. In *Halbert*, for example, this Court held that both due process and equal protection concerns required Michigan to provide appointed counsel to indigent defendants seeking access to appellate review. 545 U.S. at 609-10. The equal protection rationale is obvious: indigent appellants should not be singled out "based solely on their inability to pay core costs." *Id.* at 610-11. The due process element of the decision, which this Court said "homes in on the essential fairness of the state-ordered proceedings" would be hard to reconcile with

a general refusal to provide appeal as of right. *Id.* at 611.

Justice Brennan wrote in *Jones v. Barnes*, that "[i]f the question were to come before us in a proper case, I have little doubt" that the Court would "decide that a State must afford at least some opportunity for review of convictions, whether through the familiar mechanism of appeal or through some form of collateral proceeding." 463 U.S. at 756 n.1 (Brennan, J., dissenting). This Court has not squarely faced the question whether defendants have some right to appeal in criminal cases only because all states except Virginia and West Virginia in fact provide such a right.

4. A Summary Denial Of A Petition For Appeal From A Punitive Damages Award Is Insufficient To Satisfy Due Process

The summary review of the petition for appeal is insufficient to satisfy this Court's strict requirements for appellate review of punitive damages awards.

After this Court vacated and remanded a West Virginia punitive damages decision in light of *Haslip*, the Supreme Court of Appeals adopted a new framework for review of punitive damages awards under state law. *Garnes v. Fleming Landfill, Inc.*, 186 W. Va. 656, 413 S.E.2d 897 (1991). As part of these reforms, the Supreme Court of Appeals purported to require "a meaningful and adequate review by the appellate

court." *Id.* at Syl. pt. 3. A defendant facing a punitive damages award may petition for appeal to the Supreme Court of Appeals. "In our review of the petition," the court held, "we will consider the same factors that we require the jury and trial judge to consider, and all petitions must address each and every factor . . . with particularity, summarizing the evidence presented to the jury on the subject or to the trial court at the post-judgment review stage." *Id.* at Syl. pt. 5.

Immediately following *Garnes*, the court accepted review of nearly all substantial punitive damages awards. See, e.g., *TXO Prod. Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870 (1992) (affirming amount of punitive damages award in title slander action); *Davis v. Celotex Corp.*, 187 W. Va. 566, 420 S.E.2d 557 (1992) (affirming amount of punitive damages award for asbestos-related death); *Hinerman v. Daily Gazette Co.*, 188 W. Va. 157, 423 S.E.2d 560 (1992) (affirming award of punitive damages in libel action).

Commentators recognized the *Garnes* decision as carving out an exception to the court's discretionary appellate review for significant punitive verdicts. See G. Stewart and D. DeCourcy, West Virginia, ABA PUNITIVE DAMAGES IN COMMERCIAL TRANSPORTATION: A STATE BY STATE SUMMARY 52 (2007) ("While appellate review of most matters in the civil litigation context is discretionary, upon petition for appeal, the West Virginia Supreme Court will review a punitive damages award." (citing *Garnes* at Syl. pt. 5)).

Insofar as *Garnes* appeared to indicate that the Supreme Court of Appeals of West Virginia would accept all petitions for appeal of significant punitive verdicts, its recent history, including rejecting appeals of two punitive damages awards totaling $370 million on one day,[2] has indicated to the contrary.

It is possible, of course, to read the *Garnes* opinion as a promise that the Supreme Court of Appeals will review the excessiveness of punitive awards *on the face of the petition for review itself*, without actually granting review. If so, it is possible that the court engaged in some review of that nature here. Even if true, however, such meager appellate scrutiny is not sufficient to satisfy due process.

First, the Supreme Court's order gives no hint that it engaged in any meaningful review of this case. Its one-page order of January 13, 2010, reads, in its relevant entirety, "Upon consideration whereof the Court is of opinion to and doth hereby refuse said petition for appeal," App.1a, offering no substantive analysis of any issue raised by Petitioners. Compare *Sheetz, Inc. v. Bowles Rice McDavid Graff & Love*,

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[2] *Estate of Tawney v. Columbia Natural Resources, LLC, et al.*, No. 080347 (W. Va. May 22, 2008) (refusing a petition for appeal from $404 million verdict, including $270 million in punitive damages) (http://www.state.wv.us/wvsca/calendar/may22_08r.htm); *Wheeling Pittsburg Steel Corp., et al. v. Central West Virginia Energy Co., et al.*, Nos. 080182 and 080183 (W. Va. May 22, 2008) (refusing petitions for appeal from $229 million verdict, including $100 million in punitive damages) (*id.*).

209 W. Va. 318, 337 n.21, 547 S.E.2d 256, 275 n.21 (2001) ("Our extensive discussion in *Vandevender* of the basis for the jury's punitive damages award . . . shows that this Court looked at the award carefully") (citing *Vandevender v. Sheetz, Inc.*, 200 W. Va. 591, 606, 490 S.E.2d 678, 691-93 (1997)); *Peters*, 224 W. Va. at 190, 680 S.E.2d at 821 ("Not only did Mr. Peters adduce evidence to prove that his termination by Rivers Edge was in retaliation for his application for and receipt of workers' compensation benefits, Mr. Peters also proved that Rivers Edge's actions in this regard were malicious."). To the contrary, it states clearly and unequivocally that a request for merits review was *denied*.

The West Virginia Rules of Appellate Procedure establish a procedure whereby the Supreme Court of Appeals can affirm a trial court's decision as obviously correct, and provide that in such cases its denial of review is a decision on the merits. W. Va. R. App. P. 7(a). That procedure was not used here. There simply is no indication that the court's denial of this petition represented anything other than what its denials usually represent – a discretionary decision that the case did not merit review, precisely akin to this Court's decision to deny certiorari. See *Triggs v. Berkeley County Bd. of Educ.*, 188 W. Va. 435, 441 n.9, 425 S.E.2d 111, 118 n.9 (1992) ("We note that our denial of appeal in *Gilkerson*, which cited no ground for rejection, is similar to the denial of *certiorari* by the U.S. Supreme Court in that the denial of appeal is not an adjudication on the

merits and does not carry any implication of approval of the judgment sought to be reviewed."); *Blackburn v. West Virginia*, 170 W. Va. 96, 101, 290 S.E.2d 22, 27 (1982) (holding that the appellate court's "refusal to docket an application for appeal from the judgment of an inferior court is not a final judgment having *res judicata* effect unless the appellate court's rejection of the application for appeal specifically addresses the issues raised by the applicant and finds that the lower court's judgment is plainly right").

Second, even if the Supreme Court of Appeals did engage in some kind of careful review of the petition itself, it is not an adequate substitute for the "exacting" and *de novo* true appellate review required by this Court's precedents. The court's terse denial of a petition for appeal falls far short of *de novo* or "exacting" review.[3]

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[3] Indeed, this Court has summarily reversed trial court decisions coming out of West Virginia that the Supreme Court of Appeals declined to review. In *Flippo v. West Virginia*, 528 U.S. 11 (1999) (per curiam), for example, this Court summarily reversed on the ground that the trial court's decision, "squarely conflicts with *Mincey v. Arizona*[, 437 U.S. 385 (1978)], where we rejected the contention that there is a 'murder scene exception' to the Warrant Clause of the Fourth Amendment." *Id.* at 14-15; see also *Nat'l Mines Corp. v. Caryl*, 497 U.S. 922 (1990) (summarily reversing West Virginia trial court in case where Supreme Court of Appeals had denied discretionary review); *Ashland Oil, Inc. v. Caryl*, 497 U.S. 916 (1990) (same).

Because the Supreme Court of Appeals' denial of a petition for review is not considered a resolution *on the merits*, it also cannot perform the important functions that this Court has ascribed to appellate review – including the development of a coherent and constraining body of precedent. A state appellate court cannot "maintain control of" or "clarify the legal principles" guiding the constitutionality of punitive verdicts if its decisions are not on the merits and in no way precedential. *Cooper Indus.*, 532 U.S. at 436 (requiring "case-by-case application at the appellate level" to give this Court's guideposts for punitive awards "more meaningful content").

The circumstances of this case demonstrate why a failure to provide meaningful appellate review of a punitive award should be deemed unacceptable under the Due Process Clause of the Fourteenth Amendment. Petitioners made what they believe to be meritorious arguments as to why no punitive damages award was constitutionally permissible and, even if some award was appropriate, why the amount of the punitive damages award in relationship to the compensatory damages award was excessive. Their petition for appeal, however, was summarily refused, without explanation.

These circumstances also make the case a suitable vehicle for deciding whether meaningful appellate review is constitutionally required in cases involving the imposition of punitive damages.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

ANCIL G. RAMEY
Counsel of Record
STEPTOE & JOHNSON PLLC
P.O. Box 1588
Charleston, WV 25326
(304) 353-8112
ancil.ramey@steptoe-johnson.com

A. NEAL BARKUS
A. NEAL BARKUS PLLC
224 West King Street
Martinsburg, WV 25401
(304) 260-9414
neal@wvworkplace.com

February 19, 2010

STATE OF WEST VIRGINIA

At a Regular Term of the Supreme Court of Appeals continued and held at Charleston, Kanawha County, on the 13th of January, 2010, the following order was made and entered:

Danny L. Frye, Plaintiff Below, Respondent

vs.) No. 091157

Superior Highwall Miners, Inc.,
a Delaware corporation;
Terex Corporation, a Delaware corporation,
Defendants Below
Superior Highwall Miners, Inc., Petitioner

On a former day, to-wit, July 28, 2009, came the petitioner, Superior Highwall Miners, Inc., by Ancil G. Ramey, Steptoe & Johnson PLLC; and A. Neal Barkus, A. Neal Barkus PLLC, its attorneys, and presented to the Court its petition praying for an appeal from a judgment of the Circuit Court of Boone County, rendered on March 9, 2009, with the record accompanying the petition. Thereafter, on August 6, 2009, came the respondent, Danny L. Frye, by Mark A. Atkinson and Paul L. Frampton, Jr., Atkinson & Polak, PLLC; and Harry M. Hatfield, Hatfield & Hatfield, his attorneys, and presented to the Court his written response thereto.

Upon consideration whereof, the Court is of opinion to and doth hereby refuse said petition for appeal. Justice Benjamin would grant.

A True Copy

Attest: Rory J. Perry, II
Clerk, Supreme
Court of Appeals

STATE STATUTES GOVERNING APPEALS IN CIVIL AND CRIMINAL CASES

ALABAMA

CIVIL: ALA. CODE §§ 12-11-30, 12-22-2; ALA. R. APP. P. 39.

CRIMINAL: ALA. CODE §§ 12-3-9, 12-11-30, 12-22-130; ALA. R. APP. P. 39.

ALASKA

CIVIL & CRIMINAL: ALASKA STAT. § 22.05.010(a)-(b)

ARIZONA

CIVIL: ARIZ. REV. STAT. ANN. §§ 12-2101, 13-4031.

CRIMINAL: ARIZ. CONST. art. 2, § 24; ARIZ. REV. STAT. ANN. § 13-4031; ARIZ. R. CRIM. P. 31.19.

ARKANSAS

CIVIL: ARK. STAT. ANN. § 16-67-308; ARK. SUP. CT. R. 1-2(a), (e); ARK. R. APP. P. 2.

CRIMINAL: ARK. STAT. ANN. § 16-91-101(a); ARK. SUP. CT. R. 1-2(a), (e).

CALIFORNIA

CIVIL: CAL. CONST. art. VI, § 12; CAL. CODE CIV. P. § 904.1(a).

CRIMINAL: CAL. CONST. art. VI, §§ 11, 12(b), (d); CAL. PENAL CODE § 1237.

COLORADO

CIVIL: COLO. APP. R. 1(a)(1), 49.

CRIMINAL: COLO. REV. STAT. §§ 13-4-102, 16-12-101; COLO. APP. R. 49.

CONNECTICUT

CIVIL: CONN. GEN. STAT. ANN. §§ 51-197a, 52-263; CONN. R. APP. P. 61-1, 84-1.

CRIMINAL: CONN. GEN. STAT. ANN. § 54-95; CONN. R. APP. P. 61-6, 84-1.

DELAWARE

CIVIL: DEL. CONST. art. 4, § 11(1)(A); DEL CODE ANN., tit. 10, § 142.

CRIMINAL: DEL. CONST. art. 4, §§ 11(1)(b), 28; DEL. CODE ANN., tit. 11 § 5301.

DISTRICT OF COLUMBIA

CIVIL & CRIMINAL: D.C. STAT. § 11-721(a), (b).

FLORIDA

CIVIL: FLA. CONST. art. V, §§ 3, 4(b)(2); FLA. R. APP. P. 9.030(b)(1)(a).

CRIMINAL: FLA. CONST. art. V. §§ 3, 4(b)(1), 5(b); FLA. STAT. ANN. §§ 924.05-06.

GEORGIA

CIVIL & CRIMINAL: GA. CONST. art. VI, § 5 ¶¶ III, V; GA. STAT. ANN. §5-6-33(a).

HAWAII

CIVIL: HAW. REV. STAT. §§ 602-59, 641-1.

CRIMINAL: HAW. REV. STAT. §§ 602-59, 641-11.

IDAHO

CIVIL: IDAHO CODE ANN. §§ 1-2409, 13-201; IDAHO APP. R. 4, 11(a).

CRIMINAL: IDAHO CODE ANN. §§ 1-2406, 1-2409, 19-2801; IDAHO APP. R. 4, 11(c).

ILLINOIS

CIVIL & CRIMINAL: ILL. CONST. art. VI, §§ 4(b), (c), 6; ILL. SUP. CT. R. 315(a).

INDIANA

CIVIL & CRIMINAL: IND. CONST. art. 7, §§ 4, 6; IND. R. APP. P. 4(A)(1)(a), 5(A).

IOWA

CIVIL: IOWA R. APP. P. 6.1(1), 6.3.

CRIMINAL: IOWA CODE ANN. §§ 602.4102(2), (4), 602.5103(b), 814.6(1).

KANSAS

CIVIL: KAN. STAT. ANN. § 60-2102(a)(4).

CRIMINAL: KAN. STAT. ANN. §§ 20-3018(b), 22-3601, 22-3602.

KENTUCKY

CIVIL & CRIMINAL: KY. CONST. §§ 110(2)(b), 115; KY. REV. STAT. ANN. § 22A.020; Ky. R. Civ. P. 76.20; KY. R. CRIM. P. 12.02.

LOUISIANA

CIVIL: LA. CODE CIV. PROC. ANN. art. 2082, 2088, 2166(e).

CRIMINAL: LA. CODE CRIM. PROC. ANN. art. 911, 912.1.

MAINE

CIVIL: 14 ME. REV. STAT. ANN. §§ 1851, 1901.

CRIMINAL: 15 ME. REV. STAT. ANN. § 2111(1).

MARYLAND

CIVIL & CRIMINAL: MD. CODE ANN. CTS. & JUD. PROC. §§ 12-301, 12-307(4), 12-308, 12-403(a).

MASSACHUSETTS

CIVIL: MASS. GEN. LAWS. ch. 231 § 113, MASS. GEN. LAWS ANN. ch. 211A, §§ 10-11.

CRIMINAL: MASS. GEN. LAWS ANN. ch. 278, § 28; MASS. GEN. LAWS ANN. ch. 211A, § 10.

MICHIGAN

CIVIL: MICH. CT. R. 7.203(A)(1), 7.301.

CRIMINAL: MICH. COMP. LAWS ANN. §§ 600.215, 600.232, 770.3(1)(a); MICH. CT. R. 7.301.

MINNESOTA

CIVIL: MINN. R. CIV. APP. P. 103.03, 117, subd. 2.

CRIMINAL: MINN. R. CRIM. PROC. 28.02, subd. 2, 29.02, subd. 1-2.

MISSISSIPPI

CIVIL: MISS. CODE. ANN. § 11-51-3.

CRIMINAL: MISS. CODE ANN. § 99-35-101.

MISSOURI

CIVIL: Mo. Const. art. V. §§ 3, 10; Mo. Ann. Stat. § 512.020.

CRIMINAL: Mo. Const. art. V. §§ 3, 10; Mo. Ann. Stat. § 547.070.

MONTANA

CIVIL: Mont. Code Ann. § 3-2-203; Mont. R. App. P. 1, 6.

CRIMINAL: Mont. Code Ann. §§ 3-2-203, 46-20-104.

NEBRASKA

CIVIL & CRIMINAL: Neb. Const. art. I, § 23, 25; Neb. Rev. Stat. §§ 24-1107, 25-1912.

NEVADA

CIVIL: Nev. R. App. P. 3A.

CRIMINAL: Nev. Rev. Stat. § 177.015(1), (3).

NEW HAMPSHIRE

CIVIL & CRIMINAL: N.H. Sup. Ct. R. 7.

NEW JERSEY

CIVIL: N. J. R. APP. PRAC. 2:2-1(b), 2:2-3.

CRIMINAL: N.J. CONST. Art. VI, § 5, p. 1(c); N. J. R. APP. PRAC. 2:2-1(a)-(b), 2:3-2.

NEW MEXICO

CIVIL & CRIMINAL: N.M. CONST. art. VI, § 2; N. M. STAT. ANN. §§ 34-5-8(A)(3), 34-5-14.

NEW YORK

CIVIL: N.Y. C.P.L.R. 5511, 5602(a).

CRIMINAL: N.Y. CRIM. PROC. LAW §§ 450.10(1), 450.70, 450.90; N.Y. C.P.L.R. 5602(a).

NORTH CAROLINA

CIVIL & CRIMINAL: N.C. GEN. STAT. §§ 7A-27(a)-(c), 7A-30, 31.

NORTH DAKOTA

CIVIL & CRIMINAL: N.D. CENT. CODE §§ 28-27-01, 29-28-02, 29-28-03, 29-28-06.

OHIO

CIVIL: OHIO CONST. art. IV. §§ 2(B)(2)(e), 3; OHIO REV. CODE ANN. § 2505.03(A).

CRIMINAL: OHIO CONST. art. IV. §§ 2(B)(2)(c), (e); OHIO REV. CODE ANN. § 2953.02.

OKLAHOMA

CIVIL: 12 OKLA. STAT. ANN. §§ 951-952, 990(A); 20 OKLA. STAT. ANN. § 30.1.

CRIMINAL: 22 OKLA. STAT. ANN. § 1051(a).

OREGON

CIVIL: OR. REV. STAT. ANN. §§ 2.516, 2.520, 19.205(1), 19.245(1).

CRIMINAL: OR. REV. STAT. §§ 2.520, 138.040.

PENNSYLVANIA

CIVIL & CRIMINAL: PA. CONST. art. 5, § 9; 42 PA. CONST. STAT. ANN. §§ 722-724, 741-762, 5105(a).

RHODE ISLAND

CIVIL: R.I. GEN. LAWS §§ 9-24-1, 9-24-11.

CRIMINAL: R. I. GEN. LAWS §§ 9-24-11, 9-24-32.

SOUTH CAROLINA

CIVIL & CRIMINAL: S.C. CODE ANN. §§ 14-8-200, 14-8-210, 18-9-20; S.C. R. APP. PRAC. 201.

SOUTH DAKOTA

CIVIL: S.D. CODIFIED LAWS ANN. § 15-26(A)-3.

CRIMINAL: S.D. CODIFIED LAWS ANN. § 23A-32-2.

TENNESSEE

CIVIL: TENN. CODE ANN. § 16-4-108, TENN. R. APP. P. 3(a).

CRIMINAL: TENN. CODE ANN. §§ 16-5-108, 39-13-206; TENN. R. APP. P. 3(b), 11.

TEXAS

CIVIL: TX. GOV'T CODE ANN. §§ 22.007, 22.225; TX. CIV. PRAC. & REM. CODE ANN. § 51.012.

CRIMINAL: TEX. CONST. art. 5, § 5(b); TEX. CODE CRIM. P. ANN. art. 4.03, 44.02, 44.45.

UTAH

CIVIL: UTAH CONST. art. VIII, § 5; UTAH CODE ANN. §§ 78A-3-102, 78A-4-105.

CRIMINAL: UTAH CONST. art. I, § 12; UTAH CODE ANN. §§ 78A-3-102, 78A-4-103, 105.

VERMONT

CIVIL & CRIMINAL: VT. CONST. ch. 2, § 30, VT. STAT. ANN. tit. 13, § 7401 (2008).

VIRGINIA

CIVIL: VA. CODE. ANN. § 8.01-670(A)(3).

CRIMINAL: VA. CODE ANN. §§ 17.1-406(A)-(B), 17.1-411.

WASHINGTON

CIVIL: WASH. REV. CODE ANN. § 2.06.030; WASH. R. APP. P. 2.2(a)(1).

CRIMINAL: WASH. CONST. art. I, § 22; WASH. REV. CODE ANN. § 10.95.100.

WEST VIRGINIA

CIVIL & CRIMINAL: W. VA. CODE § 58-5-1(j); W. VA. R. APP. P. 7.

WISCONSIN

CIVIL & CRIMINAL: WISC. CONST. art. I, § 21; WIS. STAT. ANN. §§ 808.01, 808.03, 809.62 (civil appeals).

WYOMING

CIVIL: WYO. CONST. art. 5, § 18, WYO. R. APP. P. 2.01a.

CRIMINAL: WYO. CONST. art. 5, § 3; WYO. STAT. §§ 6-2-103, 7-12-101.